

ANNA OPHEIM  
CHRIS ROY OPHEIM  
PHILIP KATELNIKOFF

IBLA 75-80, 75-82, 75-83

Decided May 27, 1975

Appeals from decisions rejecting Alaska Native Allotment applications AA 7568, 7569, and 7567.

Affirmed.

1. Alaska: Native Allotments -- Withdrawals and Reservations: Generally

Withdrawn lands and lands closed to nonmineral entry are not open to appropriation under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970). No rights may be initiated under the Alaska Native Allotment Act by occupation and use of lands not open to appropriation.

APPEARANCES: Matthew D. Jamin, Esq., and James Grandjean, Esq., of Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Anna Opheim, Chris Roy Opheim and Philip Katelnikoff have appealed from separate decisions of the Alaska State Office, Bureau of Land Management, dated June 7, 1974, rejecting their applications filed under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970). The appeals have been consolidated for decision.

The lands in issue are situated on Spruce Island. They were first withdrawn by Executive Order 8344 on February 2, 1940; they were then included in the military withdrawal of August 29, 1941, Executive Order 8877. While under withdrawal, they were leased under the Alaska Grazing Act, 43 U.S.C. § 316 et seq. (1970). In

1962 they were covered by a State selection, under the Alaska Statehood Act, 48 U.S.C. notes prec. § 21 (1970), and an adjustment in the grazing lease was made for that purpose as provided in 43 CFR 4131.3-1. The lands are now withdrawn for Native Village selection under the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. (Supp. III, 1973). None of the appellants effected five years' continuous use and occupancy of the land prior to 1940.

[1] The record is clear that at no time did appellants use and occupy the lands claimed by them while the lands were open to settlement. It follows that they gained no rights by reason of their use and occupation. Martha D. Taylor (On Reconsideration), 17 IBLA 329 (1974); Mary Gallagher, 16 IBLA 294 (1974); Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974); Helena M. Schwierte, 14 IBLA 305 (1974); Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971). Nor may claimants assert aboriginal rights to qualify as claimants. Section 4 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1603 (Supp. III, 1973). The Board has held that rights under the Alaska Native Allotment Act are nonalienable, nontransferable, and noninheritable, and terminate with death. Larry W. Dirks, Sr., 14 IBLA 401 (1974).

There are no controlling facts alleged by appellants which are in dispute. Therefore, no purpose could be served by a hearing to adduce additional evidence. Nor are appellants entitled to a hearing under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970), as the holding of such hearing is discretionary with the Secretary. Pence v. Morton, Civil No. A 74-138 (D. Alaska, filed April 8, 1975). Accordingly, appellants' request for a hearing is denied. Furthermore, where the public interest would be best served thereby, the Secretarial discretion is served in withholding an allotment. Pence v. Morton, supra.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decisions appealed from are affirmed.

Frederick Fishman  
Administrative Judge

We concur:

Joseph W. Goss  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

